REPORTER'S CERTIFICATE

The above and foregoing is a true and complete transcription of my stenotype notes taken in my capacity as Official Reporter of Division 9, District Court, Jefferson County, Colorado, at the times and place above set forth.

Dated at Golden, Colorado, December 18, 1992.

Linda Kay Robra

Linda Kay Robra, R.P.R.

DISTRICT COURT, JEFFERSON COUNTY, STATE OF COLORADO

Case No. 90 CV 3966, Division 9

COURT'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

WESTERN STATES MINERALS CORPORATION,

Plaintiff,

v.

ASOMA (UTAH), INC, et al,

Defendants.

Plaintiff, Western States Minerals Corporation ("Western"), sold a gold mining operation in Utah to Defendant, Asoma (Utah), Inc. ("Asoma"), a corporation. This corporation, along with Defendant, Jumbo Mining Company, ("Jumbo"), an unincorporated association, was totally owned by Defendants Ed B. King and Janet King. Janet King was dismissed as a party, upon stipulation, at the start of trial. At all pertinent times Defendant Ed B. King was acting for Western and Jumbo. Therefore, references to King's acts may include his actions on behalf of Asoma and Jumbo.

FACTS

King, on behalf of Asoma, purchased a gold mining operation from Western known as the Drum Mine. In a trial to the Court May 4, 1992 through May 13, 1992, the sole issue considered was whether or not Asoma has the obligation to perform reclamation work upon the mine property required because of mining operations of Western that occurred before the sale.

Western conveyed the mining operation to Asoma by a Quitclaim Deed and Assignment effective October 12, 1988. The Quitclaim Deed provides, "Assignor shall be responsible for all reclamation on the lode mining claims and the properties." Western claims that a drafting error occurred. The deed provision should read "assignee" shall be responsible for reclamation. King denies that there was a drafting error. He contends the deed was supposed to state that the assignor was responsible for reclamation. King's assertion is that he (Asoma) is only responsible for performing reclamation work upon portions of the mining property upon which he conducted mining operations.

King has much experience in gold and silver mining. In late

1987 and early 1988 he had discussions with Buck Morrow, the head of Western, an established mining company. King and Western owned mining properties in Utah near each other. King and Morrow had discussions about possible purchases of various Western-owned property by King. King was particularly interested in purchasing water that Western owned in the area. King could use this on his nearby mining property known as Ibex. Morrow was not interested in selling just the water but wanted to sell the entire operation which was referred to as the Drum Mine. The contacts between the parties led to King and Morrow determining on June 2nd or 3rd, 1988 that King would purchase the Drum Mine for $1,000,000 "where is, as is." Western would walk away from the project with no remaining responsibility. Morrow had cryptic notes showing the references to reclamation being discussed on June 2nd or 3rd. Morrow assigned duties for completing the transaction to other personnel of Western, particularly Al Cerny.

George Reeves, a mining attorney, testified that he drafted the Quitclaim Deed and Assignment. He was instructed to make the assignee responsible for reclamation. He made a mistake and used the word assignor instead. Mr. Cerny had discussions with Reeves. They went over the specific language of the Deed and Assignment relating to responsibility for reclamation more than once. Mr. Cerny underlined the provision providing that assignor had reclamation responsibility and put stars by this language. Mr. Reeves told him that the reclamation responsibility of King could not be clearer.

The parties executed an option agreement on June 30, 1988. The Quitclaim Deed by which it was proposed that the transfer of the property would be accomplished at closing was attached to the Option Agreement as an exhibit. This Quitclaim Deed contained the provision for assignor doing the reclamation work.

The contract provided that King had a period of about 90 days in which to perform due diligence to determine if he wished to purchase the Drum Mine. King promptly proceeded to examine the project and perform his due diligence.

The mining operation is performed by leaching gold from ore which is assembled in heaps. King discovered that permits had not been issued for a substantial number of the heaps. This means that they were not approved by the Division of Oil, Gas and Mining (DOGM), Department of Natural Resources, State of Utah. King also discovered that Western was obligated to furnish topsoil for required reclamation. The topsoil was not on the site. King attempted to renegotiate the price because of the unpermitted heaps and matters which he claimed made the property worth less than had been represented to him. Western refused to negotiate and refused to refund the $30,000 option money King had paid. King testified he went to the closing of the purchase and sale with two letters

prepared. In one he rejected the contract and in the other he accepted. After much consideration King determined that he would go through with the contract and closing occurred on October 12, 1988.

Before the closing the parties negotiated vigorously over many aspects of the transaction including what personal property was to be transferred and whether the option payment of $30,000 applied against the ultimate purchase price.

Western was anxious for their reclamation bond to be released. It had posted a bond for $264,000 with the State of Utah. King attempted to assume Western's reclamation bond because the premium for him to replace this bond was prohibitive. Western refused to restructure the transaction to allow King to assume its bond.

Before the closing on October 12, 1988, Cerny and King had a discussion regarding the difficulty King encountered in replacing the reclamation bond. King told Cerny that he recognized that he had the reclamation obligation since Day 1. But, King said, the reclamation obligation was not covered in their agreement. Cerny testified that, in spite of King's statement, he, Cerny, was still certain that the agreement provided that King had the responsibility for reclamation. Mr. Cerny was the most credible of all the individuals who testified. He was careful to be accurate in relating his best recollection of the occurrences. Even though he was employed by Plaintiff, his motive appeared to be accuracy, not advocacy.

After the closing, King continued his negotiation and efforts with DOGM to get the permits transferred to his company and to begin the gold mining operations. Western continued to try and get relieved of liability upon its $264,000 reclamation bond. King dealt with DOGM in a manner consistent with the reclamation obligation being his. By letter of October 21, 1988 King informed DOGM that it might not be economically attractive for him to leach gold on heaps 6, 8 and 10. He indicated that if he does not proceed, he will initiate the reclamation called for by the permit. Plaintiff's Exhibit 53 (fourth page of exhibit which is numbered "Page 2 of 4."). The Court finds this refers to the permits then in existence which had been obtained by Western. King's assertion that this refers to "future permits" is not reasonable.

By memorandum and letter dated December 5 and December 6, 1988, respectively, the Utah authorities informed Mr. King that he would be responsible for the entire reclamation at the Drum Mine site. Plaintiff's Exhibits 54 and 55. After certain adjustments were made, the State of Utah informed King of Jumbo's reclamation obligation in the following language, at Paragraph 14.1 of Exhibit 55:

> Jumbo Mining Company has purchased the Drum Mine (M/027/007) from Western States Minerals Corporation. As part of the purchase, Jumbo has assumed the responsibility for continued mining operations and the reclamation obligations for this mine.

These statements are a direct affirmation of the statements made by King in his Notice of Intention filed with Utah on July 14, 1988. This Notice says, on Page 1 (the third page of the exhibit):

> All future mining, heap leaching, and reclamation will be preformed [sic] by and be the responsibility of Jumbo Mining Company in accordance with the Permit existing at the Drum Mine.

Plaintiff's Exhibit 31.

In his response to DOGM dated January 19, 1989, Mr. King did not dispute the statements of the Utah authorities. He undertook to proceed with the mining of the property he had purchased. In none of the letters written by Mr. King before April 1989, nor in any of the maps appended thereto describing the reclamation yet to be accomplished, did Mr. King suggest or intimate that Western had any remaining reclamation obligation at the Drum Mine site. See Plaintiff's Exhibits 58a, 59, 60a and b.

King wrote to prospective investors referring to the $264,000 reclamation obligation as being a part of the obligations undertaken in the purchase of the Drum Mine.

Mr. Morrow, the President of Western, testified that Western would not have retained reclamation liability after they removed all their equipment from the site and sold all of the water which they owned. Water would be needed to perform the reclamation.

Western caused what purported to be a routine audit letter to be sent to King. This was soon after Western initially learned of the drafting mistake in the Quitclaim Deed. King responded to the audit letter of March 16, 1989 acknowledging that Asoma had "assumed responsibility for all reclamation costs."

Soon after this King began to assert his theory of split reclamation. He contends his companies were only responsible for reclaiming upon the land he had disturbed by mining operations. Given King's attention to detail and his negotiation of the many facets of the transaction, it would be inconsistent for him to not cause such a theory to be clearly memorialized in detail in the contract documents. King knew from his earlier conversations with Cerny that Western believed the contract provided the reclamation

obligation to be his. King knew that the Quitclaim Deed was drafted to the contrary.

King wrote to Cerny by letter of April 17, 1989 stating his split reclamation theory. He had advised Cerny of this on the telephone a day or two before. King submitted a map to DOGM outlining what was the reclamation responsibility of Western and the responsibility of King (Asoma) on April 27, 1989. Plaintiff's Exhibit 64 (third page). See also the map in Defendants' Exhibit S-4. On February 27, 1989 a similar map not differentiating the reclamation responsibility was submitted. Plaintiff's Exhibits 60A and 60B. This creates a persuasive inference that King changed his stance on reclamation responsibility between the time the first map was submitted on February 27, 1989 and the submission of the second map on April 27, 1989.

CONCLUSIONS OF LAW

Burden of Proof

Courts reform contracts by changing a term only upon strong evidence. Many Colorado cases have held that contracts should not be reformed on account of mistakes unless the proof that the contract does not express the true intent or agreement of the parties is clear, unequivocal and indubitable. *Segelke v. Kilmer*, 145 Colo. 538, 360 P.2d 423 (1961). See also cases cited therein. In more recent years the appellate courts have dropped the term "indubitable" and allowed reformation if the evidence clearly and unequivocally shows that an instrument does not express the true intent or agreement of the parties. *Atchison v. City of Englewood*, 193 Colo. 367, 568 P.2d 13, 17 (1977). This Court is persuaded by clear and unequivocal evidence, and even by indubitable evidence, that the parties intended that King should assume all of Western's reclamation responsibility. The Quitclaim Deed provision that "assignor shall be responsible for all reclamation . . . ." was a drafting mistake. Assignee was intended.

Negligence

This Court must next consider whether Western is barred from reforming the contract because of its mistake in not discerning the error in drafting. Mr. Cerny and the Company's mining attorney, George Reeves, went over the language many times and failed to learn that the Quitclaim Deed stated "assignor" when it should have said "assignee." This would probably be negligence in a tort setting. Western "looked but failed to see." But in a contract setting, the consequences may not be as severe as those applied to a tort litigant whose negligence is equated with "failing to look at all." When mistakes are made, a court should consider the good faith of the parties. *Powder Horn Constructors v. Florence*, 754 P.2d 356, 361 (Colo. 1988).

Comment e. of § 161 of Restatement (Second) of Contracts is instructive:

> *Known mistake as to a writing.* One party cannot hold the other to a writing if he knew that the other was mistaken as to its contents or as to its legal effect. He is expected to correct such mistakes of the other party and his failure to do so is equivalent to a misrepresentation, which may be grounds either for avoidance under § 164 or for reformation under § 166. . . . The failure of a party to use care in reading the writing so as to discover the mistake may not preclude such relief . . . .

Mr. Morrow failed to use care in reading the contract. He stated that he does not read preliminary drafts of contract; only the final draft. He testified that he only skimmed the final draft in this case. Mr. Cerny and Mr. Reeves read the contract several times. They tried to exercise care but still failed to discern the mistake of which King was aware.

These mistakes do not preclude Western from having the contract reformed to reflect the parties' original intention and although Western made a remarkable mistake, it did not act in bad faith. Mr. King seeks to use the mistake to avoid obligations he undertook in a business deal that did achieve the profitable fruition for which he had hoped.

ORDER

IT IS ORDERED AND ADJUDGED that the Quitclaim Deed and Assignment effective October 12, 1988, is reformed so that the last sentence of Paragraph 3 reads: "Assignee shall be responsible for all reclamation on the lode mining claims and properties."

ATTORNEY FEES

Plaintiff requests attorney fees because attorneys with Davis, Graham and Stubbs withdrew as trial counsel when Defendants endorsed them as witnesses. The possibility that attorneys drafting a contract, which is the subject of a lawsuit, will be called as witnesses is foreseeable. This should have been anticipated when the attorneys began representing Plaintiff. Davis, Graham and Stubbs requested leave to withdraw a short time before a previously scheduled trial date. This Court felt that the case could proceed to trial as a trial to the Court in spite of Davis, Graham and Stubbs' ethical concerns. Only after Mr. Morrow personally requested that Davis, Graham and Stubbs be allowed to withdraw did the Court allow its withdrawal and continue the previously set trial date. There is no basis for awarding attorney

fees.

IT IS ORDERED that Plaintiff's claim for attorney fees is DENIED.

Dated this 8 day of October, 1992.

BY THE COURT

Tom Woodford
District Judge

cc: Lee D. Foreman, Esq.
Rachel A. Bellis, Esq.

Z. Lance Samay, Esq.

R. Kirk Mueller, Esq.

Q3506-17

FILE
Court Docs

DISTRICT COURT, COUNTY OF JEFFERSON, STATE OF COLORADO

Case No. 90 CV 3966, Division 9

ORDER OF JUDGMENT

WESTERN STATES MINERALS CORPORATION,
a Utah corporation,

Plaintiff,

v.

ASOMA (UTAH), INC., a Delaware corporation,
JUMBO MINING CO., an unincorporated
association, and ED B. KING, a/k/a E.B. KING,

Defendants.

THIS COURT, having held a trial to the Court May 4, 1992 through May 13, 1992, on Plaintiff's second claim in this action which sought reformation of the contract between the parties, and

HAVING issued written Findings of Fact, Conclusions of Law and an Order on October 8, 1992, finding in favor of Plaintiff and against Defendants, and Ordering the Quit Claim Deed and Assignment reformed as further described in that Order, and

THERE BEING no other issue of fact or law remaining to be resolved on the Plaintiff's Second Claim for Relief,

ORDERS that judgment will enter in favor of Plaintiff and against Defendants on Plaintiff's Second Claim for Relief herein, and further orders:

1. The Findings of Fact and Conclusions of Law contained in the Court's Order of October 8, 1992 are incorporated by reference and made a part of this Order of Judgment, as if expressly recited herein; and

2. Because issues still remain in the case relating to the parties' other claims for relief and damages, the entry of this Order of Judgment will not be construed as "final" for purposes of appeal, and the time limits within which Defendants may appeal the Court's Findings and Judgment shall not be deemed to have begun to run until further Order of Court.

DONE AND SIGNED this 23 day of February, 1993, nunc pro tunc January 27, 1993.

BY THE COURT:

Tom Woodford
District Court Judge

APPROVED AS TO FORM:

Lee D. Foreman, #2567
Haddon, Morgan & Foreman, P.C.
150 East Tenth Avenue
Denver, CO 80203
(303) 831-7364

Attorneys for Plaintiff
Western States Minerals
Corporation

R. Kirk Mueller
Holland & Hart
555 Seventeenth Street
Suite 2900
Denver, CO 80201
(303) 295-8000

Z. Lance Samay
One Washington Street
Post Office Box 130
Morristown, NJ 07963-0130
(202) 540-1133

Attorneys for Defendants
ASOMA (Utah), Inc., Jumbo
Mining Corporation, and
Ed B. King, a/k/a E.B. King